Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-127

ASSOCIATED SHOWER DOOR CO., INC., AND CENTURY SHOWER DOOR COMPANY, INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NELSON, KIRSHMAN, GOLDSTEIN, GENTILE & REXON
1801 Century Park East, Suite 2400
Los Angeles, California 90067
(213) 553-8660
BY: NORMAN H. KIRSHMAN
Attorneys for Petitioners,
Associated Shower Door Co., Inc.,
and Century Shower Door Company,
Inc.

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Los Angeles, California 90067
(213) 553-8660

Attorneys for Petitioners,
Associated Shower Door Co., Inc.,
and Century Shower Door Company,
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PETITION FOR WRIT OF CERTIORARI

Petitioners, Associated Shower Door Co., Inc., and Century Shower Door Company, Inc., ("Petitioners") pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit which affirmed and enforced a Decision and Order of the National Labor Relations Board (the "Board").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 512 F. 2d 230 (1975) (Appendix A). The Decision and Order of the Board is reported at 205 NLRB No. 95 (1973) (Appendix B).

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 1975 (Appendix C). Thereafter, a rehearing was sought by Petitioners and was denied by the Court of Appeals in an order filed April 25, 1975 (Appendix D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Board had the authority to order an employer to comply with a collective bargaining agreement and thereby violate the Economic Stabilization Act of 1970 and Executive Orders and Regulations promulgated thereunder, where the agreement, at the time compliance was required by the Board, had not received requisite approval from the wage control committee, established by those laws.

2. Whether Petitioners, who as individual employers did not meet jurisdictional standards established by the Board, may be prosecuted by the Board for alleged unfair labor practices when at the time the alleged violations were committed, the multi-employer bargaining group, which provided the sole basis for Board jurisdiction over Petitioners, was no longer viable.

3. Whether the Board may order an employer to comply with a collective bargaining agreement which, by agreement and operation of law was subject to the occurrence of a condition precedent, and at the time the Board issued such order the condition had not occurred.

STATUTES AND REGULATIONS INVOLVED

The Statutes involved are as follows:

1. Sections 8(a) (1) and 8 (a) (5) of the National Labor Relations Act, as amended (the "Act") 29 U.S.C. 151, et seq. (Appendix E, page E-1).

2. The Economic Stabilization Act of 1970, Act of Aug. 15, 1970, Pub. L. No. 91-379, Title II, 84 Stat. 799, as amended by Act of Dec. 17, 1970, Pub. L. No. 91-558, Title II, §201, 84 Stat. 1468; Act of March 31, 1971, Pub. L. No. 92-8, §2, 85 Stat. 13;

Act of May 18, 1971, Pub. L. No. 92-15, §3, 85 Stat. 38 (now includes Act of Dec. 22, 1971, Pub . L. No. 92-210, §2, 85 Stat. 743, entitled "Economic Stabilization Act Amendments of 1971" and Act of April 30, 1973, Pub. L. No. 93-28, §§ 2-8, 87 Stat. 27-29, entitled "Economic Stabilization Act Amendments of 1973.") (Appendix E, pages E-1 - E-5.)

The Regulations involved are as follows:

1. Exec. Order 11588, 3 C.F.R. 147 (Supp. 1971) §§ 3(a) and 4(c). (Appendix E, pages E-5 - E-7.)

2. Pay Board Order No. 2, 36 Fed. Reg. 21857 (1971). (Appendix E, page E-8 - E-9.)

STATEMENT OF THE CASE

Except as noted hereinbelow, Petitioners will rely upon the recitation of relevant facts that is found in the opinion of the Court of Appeals (Appendix A). A summary of those facts follows.

In August 1971, Petitioners were members of a multi-employer bargaining group (the "Association"). At that time the Association was engaged in negotiations for a new contract

with the certified representative (the "Union") of certain employees of its members (Appendix A, pages A-1 - A-2). The negotiations reached an impasse on September 15, 1971. On September 16, the Union struck all Association members. Between September 17 and September 23, 1971, the Union and three Association members negotiated individual agreements and a fourth member withdrew from the Association without objection by the Association or the Union (Appendix A, page A-2).

In early October, Petitioners and another employer not a party to this proceeding, each notified the Union and the Association in writing of its withdrawal from the Association. The Union responded in writing contending that the withdrawals were untimely and that the Union would consider Petitioners bound by any agreement ultimately reached between the Union and the Association (Appendix A, page A-2).

On or about November 11, 1971, the Association and the Union executed a collective bargaining agreement.

The alleged violations of Sections 8(a)(1) and (5) of the Act concerned herein are predicated upon Petitioners' failure to accept and comply with the terms of that Agreement (Appendix A, page A-2).

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, expressing essential agreement with the concurring opinion of then Board Chairman Miller, found that although Petitioners had effectively withdrawn from the Association following picketing by the Union and the signing of individual agreements with members of the Association, subsequent conduct by Petitioners "reestablish[ed], through either actual or apparent authority, an agency relationship with the representatives who had formerly represented the old multi-employer unit." (Appendix A, page A-3).

The reference by the Court of Appeals to the "old Multi-employer unit" can only be interpreted as further agreement by the Court with Chairman Miller, that at the time of Petitioners' withdrawals, in early October 1971, the multi-employer unit, as a result of the whipsaw tactics used by the Union, was no longer viable (Appendix B, page B-5).

During the proceedings before the Court of Appeals, the Board[1] conceded that at least part of the collective bargaining agreement in issue was arguably subject to the jurisdiction of the Construction Industry Stabilization Committee (the "C.I.S.C.").

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1 (At page 15 of its brief) The brief is not included with this petition.

Nevertheless, the Court of Appeals found that Petitioners had violated the Act by failing to abide by the terms of that agreement and stated that the "Board's reservation until the compliance stage of the proceedings of the resolution of any conflicts between the terms of the agreement and relevant wage and price freeze regulations, as well as the question of C.I.S.C. approval was proper." (Appendix A, page A-5, note 4).

No reference was made by the Board or the Court of Appeals to the testimony of the attorney for the Association that Pay Board approval was a condition precedent to the Agree-Agreement,[2] or to the testimony of the Union representatives accepting that conditiion with the promise that the Union would submit the Agreement to the C.I.S.C.[3]

Board jurisdiction over Petitioners was predicated solely upon their membership in the Associated (Appendix B, pages B-11 - B-12).

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2 Testimony at page 260 of the reporter's transcript. The transcript is not included herein.

3 Testimony at pages 147-49 of the reporter's transcript.

REASONS FOR GRANTING THE WRIT

I. THE DECISION AND ORDER OF THE BOARD WHICH WAS AFFIRMED AND ENFORCED BY THE COURT OF APPEALS PRESENTS A DIRECT CONFLICT BETWEEN LAWS IN FORCE AT THE TIME THE ALLEGED UNFAIR LABOR PRACTICES WERE COMMITTED AND THE BOARD'S RESPONSIBILITY TO ENFORCE THE NATIONAL LABOR RELATIONS ACT.

Petitioners were found by the Board and the Court of Appeals to have violated the Act by failing to comply with a collective bargaining agreement under circumstances wherein compliance with the agreement would have constituted violation of Executive Order 11588, promulgated pursuant to authority granted by the Congress to the President in the Economic Stabilization Act of 1970 ("Stabilization Act").

Section 4(c) of that Executive Order provided:

> Unless and until an increase in wage or salary has been approved in accordance with the provisions. . . of this order, it shall be a violation

> of this order to put such wage or salary increase into effect."

The Pay Board which was established pursuant to the Executive Order thereafter established regulations and guidelines. Order No. 2 of the Pay Board provided:

> "All wages and salaries and other economic adjustments contained in collective bargaining agreements, whether scheduled to take effect in the period from August 16 through November 13, 1971, or scheduled to take effect after November 13, 1971 (whether or not previously approved by the Committee) now require the approval of the Construction Industry Stabilization Committee regardless of the number of employees affected." 36 Fed. Reg. 21857 (1971).

The Court of Appeals did not question the jurisdiction of the C.I.S.C. over the agreement in issue. Both at the time Petitioners were charged with unfair labor practices, and during the pendency of the proceedings before the Board, implementation of the agreement without C.I.S.C. approval could not have been lawfully accomplished. No evidence of C.I.S.C. approval was before the Board or the Court of Appeals.

From the record before it, the Court of Appeals determined that Petitioners were obligated to comply with the Agreement, and approved the Board's reservation until the compliance stage of these proceedings "the resolution of any conflicts between the terms of the agreement and the wage and price freeze regulations, as well as the question of C.I.S.C. approval." (Appendix A, page A-5, note 4.)

In essence, the Board and the Court of Appeals determined that Petitioners violated the Act by failing to abide by the terms of an agreement, which at the compliance stage of the proceedings may be found to have been in conflict with what, in 1971, were emergency legislation and executive orders designed to retard galloping inflation.

Wage and fringe benefits constitute the heart and soul of a labor agreement. What in Petitioners view was an excessively expensive wage and fringe benefit package was obviously the motivating factor in their refusal to accept the Agreement. If those provisions were in conflict with then existing wage controls, Petitioners' refusal to abide by the Agreement could not constitute violations of the Act. A necessary prerequisite to any finding that the Act was violated, is a finding that Petitioners, in 1971, absent C.I.S.C. approval, could have lawfully implemented the terms of the collective bargaining agreement. No such finding was made or was possible on the record of the case.

The findings and conclusions of the Court of Appeals and the Board are not supported by substantial evidence on the critical issue of C.I.S.C. approval. More significant for purposes of this Petition, the decision of the Court of Appeals, if permitted to stand, is an invitation to the Board to enforce the Act in a single minded manner, oblivious to other equally important federal laws and policies.

The approval by the Court of the Board's procedure reserving the issue of conflict between the agreement and the wage control laws for the compliance stage of the proceedings will result in further protraction of the administrative proceedings and multiplicity of litigation. Should the conflict issue be litigated during compliance hearings in this case, the Board will be faced with the formidable task of attempting to determine what action would have been taken by the now defunct C.I.S.C. had the Agreement been timely submitted for its consideration in 1971. Petitioners submit that neither the Board nor any administrative or judicial body is equipped to accomplish that task successfully.

The fact that wage and price controls are no longer in force should not render this case moot. The case presently is a dangerous precedent which, if not overturned by this Court, will encourage the Board and other administrative agencies to issue orders in cases involving conflicts between several federal laws, and avoid the problem of conflict by

deferring the issue to compliance proceedings. The cost of continued litigation in such cases will cause most of them to be settled informally. The result could be the creation of substantial case precedent permitting the agency to issue orders in disregard of apparent conflict with other equally important federal laws.

This Court, in Southern Steamship Company v. NLRB, 316 U.S. 31 (1942) recognized the problem of overzealous enforcement of one federal law at the expense of equally important congressional objectives and policies. The Court said:

> "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purposes calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." Id., at 47.

cf. American News Co., Inc., 55 NLRB 1302 (1944);

ABC Prestress & Concrete, 201 NLRB 820 (1973).

In 1971, inflation was of paramount concern to both the legislative and executive branches of the federal government. However important the policies of the Act to encourage collective bargaining and insure stability in labor relations, the Board must make reasonable accommodation to other federal laws and policies.

The decision of the Court of Appeals, if not reversed by this Court is a mandate to the Board to concern itself with the caveat of Southern Steamship only at the compliance stage of Board proceedings, and to single mindedly enforce the Act in deciding cases on the merits.

A collective bargaining agreement that requires either or both parties to violate the law is against public policy and should not be enforced by the Board or the Courts.

Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100, ___ U.S. ___, 95 S.Ct. 1830 (1975) although not factually in point demonstrates this Court's concern with the problem of balancing the intent of the Congress as expressed in the Act with the importance of preserving the integrity of other federal laws. In Connell Construction, the Court stated, in substance that if a labor agreement violates the federal anti-trust laws, the federal courts must entertain an action to invalidate the agreement. Had the Connell case resulted from an unfair labor practice charge alleging violation by Connell of Sections 8(a)(1) and (5) of the Act by reason of its

refusal to abide by the agreement, it would have been incumbent upon the Board to resolve the issue of conflict with the anti-trust laws before it could properly order Connell to compy with the agreement.

The import of the Board's order as enforced by the Court of Appeals is that in November 1971, Petitioners could either implement the collective bargaining agreement and violate existing federal wage control laws, or comply with the wage control laws and violate Sections 8(a)(1) and (5) of the Act. In essence, the Board and the Court decided that the Act takes precedence over wage controls. Petitioners were denied due process by being placed in a "damned if you do, damned if you don't" dilemma.

See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), and Morgan v. Commonwealth of Virginia, 328 U.S. 373 (1946).

The decisions below beg the question of conflict between the Act and the 1971 emergency wage controls and ignore the wisdom of Southern Steamship (supra). The result is unsound and inequitable.

II. THE DECISION OF THE COURT OF APPEALS CONSTITUTES A DEPARTURE FROM ESTABLISHED STANDARDS IN RESPECT TO THE EXERCISE OF JURISDICTION BY THE BOARD.

As noted heretofore, the Court of Appeals found, in agreement with Chairman Miller, that as the result of the Union's whipsaw tactics, in derogation of the principles of multi-employer bargaining, and the defection from the mutli-employer bargaining unit of four or its members, the multi-employer group was not viable at the time Petitioners effectively withdrew (Appendix A, page A-3).

It was stipulated by the parties and the Board found that but for Petitioners' membership in the Association, no independent basis existed for the exercise of Board jurisdiction. It must follow therefrom that at the time Petitioners "reestablish[ed] through either actual or apparent authority, an agency relationship with the representatives who had formerly represented the old multi-employer unit" (Appendix A, page A-3), the agency relationship was established with the individual representatives and not the Association. No agency relationship could have been established with the Association, which at that time was not a viable organization. Accordingly, no basis existed at the time the alleged unfair labor practices were committed

upon which the Board could have exercised jurisdiction.[4]

It would appear that the Court of Appeals, in failing to comment upon the issue of jurisdiction raised by Petitioners both in their brief and in oral argument, has taken the position that once Board jurisdiction attaches by virtue of membership in a multi-employer bargaining group, jurisdiction continues thereafter even if at the time of the alleged violations of the Act the multi-employer group is no longer viable, and the individual operations of the employer in question does not meet the Board's jurisdictional standards. Such a rule of law conflicts with established principles which measure jurisdiction by operations or activities at the time the alleged violation of law occurs.

Since jurisdiction--the concept of when and where government may exercise its power over private enterprise--is a basic precept affecting fundamental concepts of due process and equal protection of the law, Petitioners submit that the erroneous conclusion that the Board retained jurisdiction over Petitioners after the collapse of the multi-employer bargaining unit is a question that warrants resolution by this Court.

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4 This is not a case where the Board may exercise its discretion in determining whether to assert jurisdiction. See Glen Manor Home for Jewish Aged v. NLRB, 474 F.2d 1145 (6th Cir. 1973) cert denied 414 U.S. 826.

III. THE DECISION OF THE COURT OF APPEALS PERMITS THE BOARD TO IGNORE ESTABLISHED COMMON LAW DOCTRINE.

Although the collective bargaining agreement is a unique contract containing aspects not present in the traditional commercial contract, it has long been recognized that basic contract principles are to be applied in the interpretation of such agreements. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79 (1953); Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957); 29 U.S.C. §185 (1970).

The Board in the exercise of its jurisdiction to construe a labor agreement cannot ignore common law contract doctrine. NLRB v. Rockaway News Supply Co., supra.

In the case at bench, both by agreement between the parties and by operation of law, implementation of the Agreement was subject to approval by the C.I.S.C. There was, therefore, a condition precedent to be satisfied before Petitioners could become obligated to perform under the Agreement. Both the Board and the Court ignored that issue in their consideration of the case.

If the decision of the Court of Appeals is permitted to stand, substantial uncertainty will

be injected into the field of labor law. A serious question will exist as to whether accepted common law contract doctrines such as conditions precedent and subsequent apply to collective bargaining agreements.

The central purpose of the Congress in enacting the National Labor Relations Act was to ensure industrial peace through the collective bargaining process. The maintenance of such peace requires predictability in respect to the legal principles governing the interpretation of collective bargaining agreements. Such predictability is essential in order to have stability in collective bargaining relationships and in labor relations in general. The uncertainty raised by the decision of the Court of Appeals warrants clarification by this Court.

CONCLUSION

For the reasons set forth hereinabove, Petitioners believe that this Petition for a Writ of Certiorari presents issues of major significance and national import. The Petition should therefore be granted.

Respectfully submitted,

NELSON, KIRSHMAN, GOLDSTEIN, GENTILE & REXON

By: Norman H. Kirshman

Attorneys for Petitioners
Associated Shower Door Co., Inc.
and Century Shower Door Company, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. ASSOCIATED SHOWER DOOR CO., INC.; CENTURY SHOWER DOOR COMPANY, INC.; and LOS ANGELES SHOWER DOOR COMPANY, *Respondent.*	No. 74-1033 OPINION

[February 24, 1975]

On Application for Enforcement of an Order of the National Labor Relations Board

Before: CHAMBERS and KOELSCH, Circuit Judges, and JAMESON,* District Judge.

KOELSCH, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order against Associated Shower Door Co., Inc., and Century Shower Door Company, Inc. (the Companies), upon the Board's findings that the Companies violated section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) and (1). The Board's decision and order are reported at 205 N.L.R.B. No. 95 (1973).

Briefly, the relevant facts are as follows: In August, 1971, a multi-employer bargaining unit of which the Companies were members (the Association)[1] and the certified representative of

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[1]Association of Shower Door Industries, Inc., which, at the time negotiations commenced, had ten employer-members.

certain employees of Association members (the Union)[2] commenced collective bargaining. The negotiations reached an impasse on September 15, 1971, and the following day the Union called a strike against all Association members. Thereafter, between September 17 and September 23, 1971, three Association members other than the Companies individually negotiated agreements with the Union, and a fourth member withdrew from the Association without objection.

Early in October, the Companies and one other Association member each formally notified, in writing, the Association and the Union of its withdrawal from the Association. However, a Union attorney informed each of these employers that the Union viewed the attempted withdrawals as untimely and would consider the employers bound by any agreement subsequently reached between the Union and the Association.

On October 19, 1971, the Union and the Association met again; representatives of both Companies were present at this meeting. And on November 1, 1971, when the Association members met among themselves to draft new proposals, representatives of Century were present.

About November 11, 1971, the Association's president, Herman Propker, executed an agreement with the Union, purportedly on behalf of the Association. The Companies' alleged violations of section 8(a)(5) and (1) of the Act are predicated on their failure to accept and comply with the terms of that agreement.

The Board initially takes the position that the Companies' withdrawals were ineffective because, once collective bargaining involving a multi-employer unit has begun, neither the employer group nor an individual employer nor the union may withdraw from such bargaining without the consent of the opposing party, absent unusual circumstances. *See NLRB v. Brotherhood of Teamsters, etc., Local No. 70*, 470 F.2d 509, 509-510 (9th Cir. 1972), *cert. denied* 414 U.S. 821 (1973); *NLRB v. Hart*, 453 F.2d 215, 217-218 (9th Cir. 1971), *cert. denied* 409 U.S. 844 (1972); *NLRB v. Strong*, 386 F.2d 929, 931 (9th Cir. 1967), *cert. denied* 390 U.S. 920 (1968); *NLRB v. Jeffries Banknote*

[2]Glaziers & Glassworkers Union Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO.

Co., 281 F.2d 893, 896 (9th Cir. 1960); *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958). We decline to enforce on this basis under the circumstances of this case.

The Board has held that a union which has commenced collective bargaining with a multi-employer unit may withdraw from the multi-employer unit with respect to one or more employers while continuing multi-employer bargaining with those employers remaining in the multiple unit. *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 N.L.R.B. 892, 895-896 (1967). Since the Board has committed itself to preserving the equality of withdrawal rights in the multi-employer unit situation, *see The Evening News Association*, 154 N.L.R.B. 1494, 1495-1497 (1965), *enforced sub. nom. Detroit Newspaper Publishers Association v. NLRB*, 372 F.2d 569, 572 (6th Cir. 1967), it seems only fair that, when an impasse is reached and a union then engages in selective picketing and enters into substantial individual agreements with employers who had been members of the multi-employer unit, the withdrawal of the remaining members of the unit, if unequivocally communicated, should be permitted. *See NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 183-184 (5th Cir. 1974); *Fairmont Foods Company v. NLRB*, 471 F.2d 1170, 1172-1174, 1174 n.1 (8th Cir. 1972); *Connell Typesetting Company*, 212 N.L.R.B. No. 140 (1974). Were the rule otherwise, a union could reach an agreement with one or more employers and then whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit. *See Hi-Way Billboards, supra*, at 183; *Connell Typesetting, supra*, slip-opinion at 9-11. Here the Companies were entitled to, and did by clear written notice, withdraw from the Association.

The Board next contends that, even if the withdrawals were effective when tendered, the subsequent conduct of the Companies constituted a retraction of those withdrawals and "re-establish[ed], through either actual or apparent authority, an agency relationship with the representatives who had formerly represented the old multi-employer unit."[3] We agree.

[3]The Board employs language borrowed from the concurring opinion of Chairman Miller, with which we are in essential agreement. *See* 205 N.L.R.B. No. 95, slip-opinion at 4-5.

The relevant findings of the Administrative Law Judge, accepted by the Board, are as follows:

> "I find on the basis of Geffner's testimony, corroborated by Propke and Robin, that Treasurer Siegel of Century and Siefert of Associated attended and participated in the negotiations between the Association and the Union, discussed the terms of the Union's proposals and the Association's counter-proposals, assisted in the preparation of the latter, and at no time informed the Union negotiators they were in a capacity other than as representatives of the Association. I further find and conclude, on the basis of the foregoing, that Siegel and Siefert attended and participated in the October 19 Association-Union negotiations as representatives of the Association. . . .
>
> "It is clear that Associated [and] Century . . . tried to secure the best of two worlds; by continuing in the negotiations between the Association and the Union following their October withdrawal, they attempted to secure terms to their satisfaction; by filing a purported withdrawal from the Association, they attempted to preserve an opportunity to reject any Association-Union agreement if dissatisfied therewith and to bargain for better terms in individual negotiations.
>
> "I find, however, that by their appearance and participation in the Association-Union negotiations after service upon the Union of their October 3-5 withdraw[al] notices, Associated [and] Century . . . retracted their withdrawals from multi-employer bargaining and accepted the Union's October 8 objection to their withdrawal and its insistence upon their remaining in and bound by the results of the multi-employer bargaining which occurred subsequent to their October withdrawal."

We have carefully reviewed the record in light of the standard enunciated by the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-497 (1951), to ascertain whether these findings are supported by substantial evidence on the record as a whole. The question is a close one, but, since the propriety of the findings turns in large part on the Administrative Law Judge's estimation of the credibility of witnesses and concerns matter peculiarly within the expertise of the Board, we conclude that the findings are supported by substantial evidence on the record as a whole.

The Companies' remaining contentions are without merit.[4]

The Board's order will be enforced.

[4]Under the circumstances, the Board's reservation until the compliance stage of the proceedings of the resolution of any conflicts between the terms of the agreement and relevant wage and price freeze regulations, as well as the question of C.I.S.C. approval, was proper.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 3-4-75—400

APPENDIX B

205 NLRB No. 95 MFJ

D--7669
Los Angeles,
Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

ASSOCIATED SHOWER DOOR CO., INC.,
Case 31--CA--2790
and

CENTURY SHOWER DOOR COMPANY, INC.
Cases 31--CA--2745
31--CA--2824
and

LOS ANGELES SHOWER DOOR COMPANY
and
GLAZIERS & GLASSWORKERS UNION LOCAL
636 INTERNATIONAL BROTHERHOOD OF
PAINTERS AND ALLIED TRADES, AFL-CIO
Cases 31--CA--2791
and 31--CA--2829

ASSOCIATION OF SHOWER DOOR INDUSTRIES,
INC.,

DECISION AND ORDER

On February 27, 1973, Administrative Law Judge George Christensen issued the attached

Decision in this proceeding. Thereafter, Respondents Associated Shower Door Co., Inc., and Century Shower Company, Inc., filed exceptions and a supporting brief, and the General Counsel filed a brief answering Respondents' exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the record, and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative

[1] The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

[2] In the absence of exceptions thereto, we adopt pro forma, the Administrative Law Judge's findings that Respondent Los Angeles Shower Door

(continued)

Law Judge and to adopt his recommended Order.[3]

We cannot agree with the view of our concurring colleague that a multiemployer unit may no longer be a valid bargaining unit merely because, after impasse, the Union has secured individual agreements from several of its members. Obviously, employers come and go in multiemployer units. Additions and withdrawals occur before, during, and after a strike, at the option of particular employers, and in timely fashion as required under long-established Board and court rules. To suggest that withdrawal from the established unit, as a consequence of a strike and the picketing of several members of the unit, may result in the destruction of the multiemployer unit where the remaining members and the Union are willing to and do continue bargaining on that basis is an entirely novel theory without support in Board or court decisions.

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[2] Company violated Section 8(a)(5) and (1) of the Act.

[3] Although we order the Respondents to comply with the contract negotiated on their behalf by the Association of Shower Door Industries, Inc., with the Union, we shall leave to the compliance stage of this proceeding the resolution of any conflict which may exist between the contract and the Wage and Price Freeze Regulations then in effect.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents Associated Shower Door Co., Inc., Los Angeles, California; Century Shower Door Company, Inc., Torrance, California; and Los Angeles Shower Door Company, Los Angeles, California; their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Aug. 24, 1973

John H. Fanning, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MILLER, Concurring:

I concur in the result herein but wish to disassociate myself from a portion of the rationale relied on by the Administrative Law Judge in his decision which has been adopted in its entirety by my colleagues.

It is true that, under Retail Associates, Inc., 120 NLRB 388, and subsequent cases, we have held that neither an employer nor a union may withdraw from multiemployer bargaining once such bargaining has commenced, absent unusual circumstances. Those unusual circumstances include the reaching of an impasse and a subsequent course of action by the nonwithdrawing party indicating its acquiescence either to specific withdrawals or to a general breakup of the multiemployer bargaining unit. The Administrative Law Judge, however, viewed the law as being that union acquiescence to employer withdrawal must be based on interaction between the union and the particular withdrawing employer. I would not adopt this view. In the instant case, after impasse was reached, the Union engaged in selective picketing which achieved its result; i.e., the making of individual agreements with employers who had formerly been part of the multiemployer unit. That course of conduct, I believe, so effectively decimated the multiemployer unit that the Union should not thereafter be heard to complain that the original multiemployer unit was no longer viable.

The facts here, however, show that subsequent to the above events which caused a breakup of the original multiemployer unit, Respondents Associated, Century, and Los Angeles so conducted themselves as to reestablish, through either actual or apparent authority, an agency relationship with the representative who had formerly represented the old multiemployer unit; i.e., President Propker and Attorney Robin. Thus these Respondents must, as a matter of law, be found to be bound by the agreement thereafter negotiated between their agents, acting on their behalf, and the Union.

The record evidence demonstrates that on October 19, a date subsequent to the October 3 and October 5 withdrawals of the three Respondents here, and subsequent to the divide-and-conquer strategy employed by the Union, Respondent Associated and Respondent Century participated in a bargaining meeting in which it surely appeared that Propker and Robin continued to be the negotiating representatives for the employers there assembled. Neither of these Respondents thereafter gave any further notice to the Union to revoke or dispel the apparent authority thus invested in Propker and Robin.

Therefore, when in November these same agents -- Propker and Robin -- negotiated to the point of agreement with the Union, Respondents Associated and Century were, in my view, bound by the agreement so made. The facts also show

that a representative of the third Respondent here, Los Angeles, specifically authorized President Propker to sign the agreement arrived at in the course of the November meeting.

Under these circumstances it seems clear to me that none of the three Respondents here could subsequently renege on the November agreement without breaching the good-faith bargaining obligation imposed by our Act. And it is upon this legal and factual basis that I would premise the finding of the 8(a)(5) and (1) violation, and thus concur in the result reached by my colleagues.

Dated, Washington, D.C. Aug. 24, 1973

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

ASSOCIATED SHOWER DOOR CO., INC.
Case No. 31-CA-2790

CENTURY HOWER COMPANY, INC.
Case Nos. 31-CA-2745
31-CA-2824

LOS ANGELES SHOWER DOOR COMPANY[1]

and

GLAZIERS & GLASSWORKERS UNION LOCAL 636 INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO[2]

and

ASSOCIATION OF SHOWER DOOR INDUSTRIES, INC.[3]

[1] Hereafter called Associated, Century and Los Angeles, respectively, or Respondents.

[2] Hereafter called the Union.

[3] Hereafter called the Association

Party to the Contract

J. R. Pollack, for the General Counsel.
Bradley Tabach-Bank, of Geffner & Satzman, Los Angeles, Calif., for the Union.
David S. Smith and Howard D. Fabrick, Beverly Hills, Calif., for Associated and Century.
Harold Schwimmer, Los Angeles, Calif., for Los Angeles.

DECISION

Statement of the Case

GEORGE CHRISTENSEN, Administrative Law Judge: On October 3, 4 and 5, 1972, I presided over a hearing at Los Angeles, California to try issues raised by a complaint issued on July 25, 1972, alleging that the Respondents violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereinafter the Act), by formally revoking the authority of the Association to represent or bind them after the Association engaged in collective bargaining on their behalf with the Union and by refusing to comply with the terms of an agreement subsequently executed by the Association and the Union.

Respondents concede they revoked the Association's authority to bargain for them after it had commenced bargaining on their behalf and refused to comply with the agreement subsequently executed by the Association and the Union, but assert they did not violate the Act because the revocation followed an impasse in Association-Union bargaining and execution of individual agreements by the Union and several members of the Association.

The basic issue, therefore, is whether the Respondents' revocations of their previously granted authorizations for the Association to represent and bind them relieved them of any further obligation under the multi-employer bargaining system they had earlier established and participated in.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue and file briefs. Briefs have been received from the General Counsel and counsel representing Associated and Century.

Based upon my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following:

Findings of Fact

I. Jurisdiction and Labor Organization

The parties stipulated and I find that at the time negotiations commenced (August 5, 1971)[4] between representative of the Association and representatives of the Association and representatives of the Union, there were ten members of the Association, namely, American Shower Door (hereinafter American), Associated, Century, Daniels Shower Door Company (hereinafter Daniels), Delta Shower Door Company (hereinafter Delta), Hecker Manufacturing Company, also known as C-E Building Products (hereinafter called C-E), Hollywood Shower Door Company (hereinafter called Hollywood), Imperial Shower Door Company (hereinafter called Imperial), Los Angeles, and Modern Shower Door Company, also known as Shower Door and Glass, Inc. (hereinafter called Modern).

The parties further stipulated and I find that Imperial, in the normal course of its business, sells goods valued in excess of $50,000 to Larwin of Southern California and that Larwin of Southern California, in the normal course of its business, annually produces a gross volume of retail sales in excess of $500,000 and annually purchases and receives directly from firms

[4] Read 1971 after all further date references omitting the year.

outside of California goods valued in excess of $10,000.

The parties further stipulated and I find that Daniels annually ships goods valued in excess of $10,000 to firms located outside the state of California.

Based upon the foregoing, I find and conclude that Associated, Century and Los Angeles, as employer-members of a multi-employer association created for the purpose of engaging in collective-bargaining negotiations with the Union, were employers engaged in interstate commerce in a business affecting interstate commerce as t those terms are defined in Section 2(2), (6) and (7) of the Act.[5]

The complaint alleges, the answer admits and I find and conclude that the Union, at all times pertinent, was a labor organization within the meaning of Section 2(5) of the Act.

[5] The parties further stipulated, and I find that, but for their inclusion in the association-wide unit, the Respondents do not meet the Board's jurisdictional standards for asserting jurisdiction over retail or non-retail enterprises.

II. The Alleged Unfair Labor Practices

A. The Unit and the Union's Majority Status Therein

The Board on August 3, in Case No. 31-RC-1731, certified that the Union was the exclusive collective-bargaining representative of all production, maintenance and installation employees of the employer-members of the Association, excluding office-clerical employees, professional employees, supervisors and guards. As noted heretofore, American, Associated, C-E, Century, Daniels, Delta, Hollywood, Imperial, Los Angeles and Modern constituted the Association's membership at that time. The certification issued following an election among the employees in the included categories specified above wherein a majority of votes were case for representation by the Union.

I therefore find and conclude that at all times pertinent, a unit consisting of all production, maintenance and installation employees of the ten employers listed above, excluding office-clerical employees, professional employees, supervisors and guards was an appropriate unit for collective bargaining purposes within the meaning of Section 9 of the Act and that the Union has represented a majority of the employees within that unit since August 3.

B. The Negotiations

On August 5, representatives of the Association and the Union commenced negotiations. During the course of the negotiations, the Union was represented by Attorney Leo Geffner, Business Manager Robert Hubbard and Business Representatives, Peter Verkerke, Mario Estrada and Maurice Batiste. During the earlier stages of the negotiations, the President of the Association, Herman Propker, was hospitalized and unable to participate therein. During this period, the Association was represented by Attorney Edward Robin, Secretary William Siegel (the top offician of Century), Treasurer William Willard (the top official of Imperial) and William Benezra and Leo Siefert (the top officials of Associated).

Negotiations continued until September 15 without settlement. Robin and Siegel acted as the Association's spokesmen and Geffner and Hubbard acted as the Union's spokesmen during this period. Geffner testified the parties reached an impasse over cost items at the September 15 meeting and the Union at that time informed the Association it was going on strike.

Siefert testified that during an employer caucus on September 15, he informed the Association representatives present, which included its attorney, secretary and treasurer, (Robin, Siegel and Willard), that he wanted no further part of the Association and representation by its attorney.

He further stated, however, that he did not inform the Union of this purported resignation at the September 15 meeting, but testified he did so inform a union business representative, McClellan, a few days later.

On September 16, the Union commenced picketing all the members of the Association.6/

On September 17, representatives of Modern called the Union and said Modern would sign the Union's last proposal of September 15, if the Union would pull off the pickets. The Union agreed, a contract was executed, pickets were removed and Modern resumed operations.

On September 21, C-E sent a letter to the Association and the Union stating it was withdrawing from the Association.

On September 22, American sent a letter to the Association and the Union stating it was withdrawing from the Association.

On September 23, C-E contacted the Union and negotiated a settlement on the same terms as the Modern-Union contract. The agreement was reduced to writing and executed the following November. Picketing at C-E ceased after the

6/ Picketing continued until approximately October 8 or 10 with exceptions noted below.

September 23 oral agreement and normal operations were resumed.

On September 23, Hollywood executed the same agreement and resumed operations.

On October 3, Century sent a telegram to the Association and the Union stating it was revoking the authority of the Association to represent or bind Century in any further negotiations.

On October 4, representatives of the Association and the Union met under the auspices of the Federal Mediation and Conciliation Service (hereinafter called FMCS). For the first time Herman Propker, president of the Association (and the top official of Daniels), appeared and participated. In addition to Propker, the Association was represented by Attorney Robin, Treasurer Willard of Delta, Rosen of Imperial and Harold Schwimer (the top official of Los Angeles). Siefert of Associated also attended and participated in the meeting. The parties' differences were discussed but not resolved.

On October 6, Associated and Los Angeles sent telegrams to the Association, its attorney and the Union stating they were withdrawing from the Association and revoking the authority of the Association and its attorney to negotiate on their behalf or bind them. Shortly thereafter, Propker met with Geffner and Hubbard. Geffner informed Propker the Union did not agree to the unilateral

withdrawal of Associated, Century and Los Angeles from the multi-employer unit and that, in his opinion, the three companies could not withdraw without the Union's consent. Propker stated since he was well enough to take charge of negotiations, he thought they could be concluded successfully and requested that the Union call off the strike. Hubbard replied the Union would comply with Propker's request and did so. Picketing ceased on approximately October 8 or 10.

On October 8, Geffner sent letters to Associated, Century and Los Angeles advising them the Union did not consent to their withdrawal from multi-employer bargaining and that each would be bound by any agreement reached between the Association and the Union.

On October 19, representatives of the Association and the Union met to negotiate. The Union modified its demands and the Association made a counter-proposal, but no agreement was reached. The Association was represented by Propker, Robin and Willard, its president, attorney and treasurer. Siegel of Century and Siefert of Associated were also present.

Siegel testified he met Propker for dinner that evening and accompanied him to Robin's office, that he did not see Siefert there, and that he left Robin's office as soon as Union representatives appeared there. He later testified he told the Union he was there only as a spectator and that

Century would be willing to negotiate with the Union but would not have any part of the meeting between the Association and the Union.

Siefert of Associated testified he came to Robin's office at Propker's invitation, on Propker's representation that he would, "get a little education"; that he did not have dinner with Propker and Siegel but met with them anf Robin after he arrived at Robin's office. Siefert testified that he left Robin's office as soon as he saw Union representatives in the office.

Geffner testified that Siegel participated in the October 19 negotiations throughout and Siefert for a substantial period. He further testified neither Siegel nor Siefert stated at anytime they were there in a capacity other than as representatives of the Association.[7/] Geffner further testified that Siefert left before the conclusion of the negotiations following a heated employer caucus (Geffner stated he could hear raised voices from the room where the caucus took place.)

Robin testified that Siefert attended the first third of the negotiations, and that Siegel was there throughout. He testified that both Siegel and

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7/ Siefert corroborated Geffner's testimony that he at no time informed any of the Union representatives he was there in any capacity other than as a representative of the Association.

Siefert participated in the discussions of the Union's proposals and the Association's counter-proposals during employer caucuses and in the preparation of the Association's counteroffer. Robin also corroborated Geffner's testimony that at no time during the negotiations did either Siegel, Siefert, Propker or he inform the Union that Siegel and Siefert were there other than representatives of the Association.

Propker testified he persuaded Siegel and Siefert to attend the negotiations on his representation that he needed their support though they conveyed to him they didn't want anything to do with the Union. Propker corroborated Geffner's testimony that the Union representatives were not informed at anytime that Siegel and Siefert were there other than as Association representatives.

I find on the basis of Geffner's testimony, corroborated by Propker and Robin, that Treasurer Siegel of Century and Siefert of Associated attended and participated in the negotiations between the Association and the Union, discussed the terms of the Union's proposals and the Association's counter-proposals, assisted in the preparation of the latter, and at no time informed the Union negotiators they were in a capacity other than as representatives of the Association. I further find and conclude, on the basis of the foreaoing, that Siegel and Siefert attended and participated in the October 19 Association-Union negotiations as representatives of the Association.

On November 1, the Association met to draft its "final offer." President Propker, Attorney Robin, Treasurer Siegel and Siegel's son of Century, Rosen of Imperial, Secretary Willard of Delta and Bud Kushara, the top official of Modern, participated in the formulation of the offer.

On November 3, representatives of the Association and the Union met. Robin and Propker appeared on behalf of the Association; Geffner and Hubbard appeared on behalf of the Union. Robin proffered the Association's November 1 offer. The Union refused to consider it.

On November 4, Robin sent a letter to Hubbard setting out the Association's November1 offer.

On November 11 or 13, the Union placed pickets at Daniels; Propker arranged a meeting with the Union. Propker, Robin, Geffner, Hubbard and Verkerke attended the meeting. After discussions of the Union's October 19 proposal and the Association's November 1 proposal and intimations the Union would extend its picketing to the rest of the members of the Association who had not signed individual contracts, Propker stated the Association was willing to accept the Union's October 19 offer. Hubbard expressed reluctance to this on the ground the individual agreements executed by Modern, C-E and Hollywood had better terms than the Union's

October 19 offer, pointing out that the Union had indicated it was withdrawing the October 19 offer when it was not accepted at the meeting. Geffner called a caucus and persuaded Hubbard to accept an agreement incorporating the Union's October 19 proposal. This necessitated modification of the Modern, C-E and Hollywood contracts with the Union, inasmuch as the three individual agreements and the Association agreement all contained "most favored nation" provisions providing that the contracting employers would have the better of any terms set by any agreement in the industry. While the parties awaited typing of the final agreement between the Association and the Union, Geffner and Verkerke left the office to pick up Geffner's car, which had been left for repairs. Propker and Robin went to another office where Propker telephoned Harold Schwimer of Los Angeles. Propker advised Schwimer of the terms agreed upon and Schwimer stated that if that was the best he could do, to go ahead with it. On the return of Geffner and Verkerke to the office, Propker informed them there were no problems in the agreement, but suggested that Robin sign it. Hubbard objected and Propker then signed the agreement. The heading of the agreement clearly indicated that the agreement was between the Association and the Union. Verkerke signed on behalf of the Union. Robin stated he would advise the members of the Association of the terms of the contract and subsequently did so.

Daniels, Delta and Imperial honored the

Association-Union contract. The separate contracts between the Union and C-E, Hollywood and Modern were modified to conform to the Association-Union contract with respect to more favorable terms of the Association-Union contract. American, Associated, Century and Los Angeles failed to comply with the Association-Union contract and, except for Los Angeles, have continued in effect lower wages, rates of pay and other terms and conditions than those set out in the Association-Union contract. On March 16, 1972, Los Angeles executed a contract with the Union wherein it agreed to observe the terms and conditions of the Association-Union contract, except that the wage increases called for therein would be placed in trust pending an appropriate Board or court order.

The Union resumed picketing Association in mid-November and continued picketing into 1972. It has not engaged in separate negotiations with or reached any agreement with Associated, and one of its representatives informed Siefert during such picketing that it would take an acceptance of the terms of the Associated-Union contract to secure removal of the pickets.

Picketing was not resumed at either American or Century. No separate or individual negotiations or agreements have been conducted or reached between the Union and Century or

American. 8/

C. Analysis and Conclusions

It has been general Board doctrine affirmed by the courts that neither an employer nor a union may withdraw from multi-employer bargaining once such bargaining has commenced absent unusual circumstances or acquiescence by the one party to the withdrawal of the other. N.L.R.B. v. Tulsa Sheet Metal Works, Inc. (C.A. 10) 367 F.2d 55; N.L.R.B. v. Jeffries Banknote Co., (C.A. 9) 281 F.2d 893; N.L.R.B. v. Sheridan Creations, Inc., (C.A.2) 357 F.2d 245; N.L.R.B. v. Corbett Press, (C.A.2) 401 F.2d 673; Universal Insulation Corp. v. N.L.R.B. (C.A.6) 361 F. 2d 406; N.L.R.B.v. Southwestern Colo. Contractors Association, (C.A. 10) 379 F.2d 360; Bill O'Grady Carpet Services, Inc., 185 NLRB No. 41; Service Roofing Co., 173 NLRB 321; Retail Associates, Inc., 120 NLRB 388.

Since it is undisputed that the three Respondents attempted withdrawals occurred after negotiations between the Association and

8/Verkerke testified without contradiction that the Union has not pursued American because it was under the impression American had disposed of its shower door business. His testimony is credited.

the Union had commenced, it is necessary to ascertain if the Union acquiesced thereto. The conduct of the Union subsequent to the withdrawals must be examined to determine if acquiescence to the withdrawals may be implied therefrom. Fairmont Foods v. N.L.R.B., (C.A. 8) 82 LRRM 2017, den. enf. of 196 NLRB No. 122; Hartz-Kirkpatrick Construction Co., 195 NLRB No. 154; Ice Cream and Frozen Custard Employees Local 717, 145 NLRB 865; Joseph C. Collins & Co., Inc., 184 NLRB No. 113; Publicity Engravers, Inc., 161 NLRB 221; C & M Const. Co., 174 NLRB 843; Atlas Sheet Metal Works, 148 NLRB 27; I. C. Refrigeration Service, et al., 200 NLRB No. 107; Neville Foundry Co., Inc., 122 NLRB 1187; Scougal Rubber Mfg. Co., 126 NLRB 470.

In all but the last two cases cited above, union acquiescence to employer withdrawal from multi-employer bargaining subsequent to commencement of multi-employer bargaining has been based upon interaction between the Union and the withdrawing empolyer, such as individual bargaining initiated by the Union with such empolyer, union offer of terms or conditions to the withdrawing employer more favorable than those proposed to the multi-employer unit, union participation in bargaining with the withdrawing empolyer over proposals by the latter, etc.

No such conduct by the Union via-a-vis the three Respondents occurred. Not only did the

Union promptly upon receiving notice of the purported withdrawal from multi-employer bargaining from the three Respondents respond with a written objection thereto and insistence that they continue to bargain through the Association and comply with the results of such bargaining, it picketed Associated after the Association-Union contract was executed, advised Siefert its pickets would be removed only when Associated complied with the Association-Union contract, and filed the charges which led to this proceeding when the Respondents failed to comply with the Association-Union contract.

In the I.C. Refrigeration Service case, ibid., the Board stated (at page 10) that, "Acquiescence exists where a union engages in separate negotiations with a withdrawing employer, listens to counter-proposals, and agrees to make certina concessions not offered the Association."

Based on the foregoing I find and conclude that the Union by its conduct vis-a-vis the Respondents did not at any time acquiesce to their withdrawal from multi-employer bargaining through the Association.

As noted heretofore, findings of union acquiescence have also been predicated on union conduct addressed to other than the withdrawing employers. Neville Foundry and Scougal Rubber, ibid. In the former case, after

multi-employer bargaining had ensued, an impasse reached and strike action taken, the Union initiated individual negotiations with one of the employer-members and signed a contract with it, consented to a Board-conducted election in a unit limited to another employer-member's employees, sought individual negotiations with a third, and neither it nor the employer group sought or conducted any further multi-employer negotiations. The Union nevertheless contended in a subsequent representation proceeding involving a fourth employer-member that the multi-employer unit was the only appropriate unit for collective bargaining purposes. The Board rejected its contention and ordered an election in the single-employer unit sought on the ground both parties had mutually acquiesced to the abandonment of multi-employer bargaining and therefore a multi-employer unit no longer existed. The Scougal case was to similar effect.

Since the Association resumed multi-employer bargaining with the Union after the impasse and strike and reached an agreement with the Union for terms common to and accepted by 7 of the 10 members of the Association, the abandonment doctrine of Neville Foundry and Scougal is inapplicable. The Union's rejection of the Respondent's Respondent's attempted withdrawals from multi-employer bargaining, its insistence on the continuation thereof, the subsequent participation of the Respondents therein and the resulting Association-Union warrants a completely opposite finding and conclusion.

The underlying purpose for the original establishment of multi-employer bargaining-uniform rates of pay, hours and other working conditions for the employees of the employers within the multi-employer unit - was realized with the November 11 Association-Union agreement and conforming the Modern, C-E and Hollywood contracts thereto, and only the failure or refusal of the Respondents prevented complete accomplishment of the commitment made by the Union and the employers who formed the Association when they commenced to bargain. The Union's acceptance of the proposals of Modern, C-E and Hollywood did not destroy the pattern, since such acceptance neither released the Union from its obligation to continue to bargain with the Association nor released the other members of the Association from their obligation to continue to bargain with the Union through the Association, N.L.R.B. v. Tulsa Sheet Metal Works, Inc., 367 F.2d 55, enf. 149 NLRB 1487; N.L.R.B. v. Southwestern Colo. Contractors Assn. 379 F.2d 360, enfl. 153 NLRB 141; Ice Cream & Frozen Custard Employees Local 717, 145 NLRB 865; Pacific Coast Assn., 163 NLRB 892.

In addition, it is clear that the three Respondents by conduct subsequent to their purported withdrawals from multi-employer bargaining through the Association retracted those withdrawals and accepted the Union rejection thereof.

Century notified the Union of its withdrawal

from multi-employer bargaining on October 3. Associated notified the Union informally about September 17, and formally on October 5 of its withdrawal. Los Angeles notified the Union on October 5 of its withdrawal.

On October 3, a representative of Associated (Siefert) participated in negotiations between the Association and the Union, under auspices of the FMCS. On October 19, representatives of Associated and Century (Siefert and Siegel) attended and participated in negotiations between the Association and the Union. On November 1, representatives of Century (Siegel and his son) participated in formulation of the Association's "final offer" to the Union. On November 11 or 13, a representative of Los Angeles (Schwimer) authorized the President of the Association (Propker) to sign the Association-Union Agreement.

It is clear that Associated, Century and Los Angeles tried to secure the best of two worlds; by continuing in the negotiations between the Association and the Union following their October withdrawal, they attempted to secure terms to their satisfaction; by filing a purported withdrawal from the Association, they attempted to preserve an opportunity to reject any Association-Union agreement if dissatisfied therewith and to bargain for better terms in individual negotiations.

I find, however, that by their appearance and participation in the Association-Union

negotiations after service upon the Union of their October 3-5 withdraw notices, Associated, Century and Los Angeles retracted their withdrawals from multi-employer bargaining and accepted the Union's October 8 objection to their withdrawal and its insistence upon their remaining in and bound by the results of the multi-employer bargaining which occurred subsequent to their October withdrawal.

On the basis of the foregoing findings and conclusions, I further find and conclude that by failing and refusing to comply with the terms and conditions of the November 11 or 13 Association-Union Agreement from the date of its execution, Associated, Century and Los Angeles violated and continue to violate Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondents, at all times pertinent, were employers engaged in commerce in a business affecting commerce and the Union, at all times pertinent, was a labor organization within the meaning of Section 2(2), (5), (6) and (7) of the Act.

2. Since August 3, the Union has been the exclusive collective bargaining representative of a majority of the employees within an appropriate unit consisting of the production, maintenance and installation employees of the employees of the employer-members of the Association, excluding

office-clerical employees, professional employees, supervisors and guards.

3. Since November 13, employees of Associated, Century and Los Angeles classified as production, maintenance and installation employees have been covered by a collective-bargaining agreement between the Association and the Union, and they and the Union are entitled to all benefits, terms and conditions contained in that agreement.

4. Since November 13, Associated, Century and Los Angeles have refused to bargain in good faith with the Union as the exclusive collective bargaining representative of their employees specified above by refusing to recognize the Union as the exclusive bargaining representative of such employees and by refusing to comply with the terms of the contract set out in 3. above and have thereby violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices occurring in connection with Respondents' operations in interstate commerce will tend to foment labor disputes burdening and obstructing commerce or the free flow thereof unless remedied in accordance with the provisions of the Act.

Remedy

Having found that the Respondents engaged in unfair labor practices, it shall be recommended that they cease and desist therefrom and take

certain affirmative action designed to effectuate the purposes of the Act.

To restore to the employees and the Union the benefits lost by the Respondents' discriminatory refusals to observe and apply the terms of the Association-Union contract shall require an order directing the Respondents to recognize and bargain with the Union concerning the affected employees, upon its request, to comply with all the terms and conditions of the contract, and to make the Union and the employees whole by paying retroactively, to the effective dates set out in the contract, any moneys or benefits payable or due thereunder.

It shall also be necessary to require that the Respondents cease and desist from commission of the unfair labor practices found to have been committed.

On the basis of the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended: 9/

9/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and (continued)

ORDER

Associated, Century and Los Angeles, their officers, agents, successors and assigns, shall:

1. Cease and desist from refusing to bargain in good faith with the Union as the exclusive collective bargaining representative of their employees in the classifications covered by the Association-Union contract and refusing to comply with all the terms and conditions of that contract.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Recognize the Union as the exclusive collective bargaining representative of the Respondents' employees in classifications covered by the Association-Union contract, bargain with the Union at its request, and make the Union and their employees in the classifications covered by the contract whole for any losses they may have suffered by virtue of the Respondents' refusals to comply with that contract since its inception;

(b) Comply with all the terms and conditions of the Association-Union contract, both for the balance of its term and retroactively;

(c) Preserve and, upon request, make

9/ all objections thereto shall be deemed waived for all purposes.

available to the National Labor Relations Board or its agents, for examination and copying, all records necessary for the determination of the amount of backpay and other payments and obligations due under this Order;

(d) Post at all places of business in the Los Angeles, California area copies of the attached notices marked "Appendixes A, B & C." 10/ Copies of such notice shall be furnished to the Respondents by the Regional Director for Region 31, and shall be signed by authorized representatives of the Respondents and posted immediately upon receipt thereof and maintained for at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other material.

10/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated: February 27, 1973

George Christensen

Administrative Law Judge

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	No. 74-1033
Petitioner,	)	RECEIVED May 10, 1975
v.	)	
ASSOCIATED SHOWER DOOR CO., INC.; and CENTURY SHOWER DOOR COMPANY, INC.,	)	Clerk
Respondents.	)	U.S. COURT OF APPEALS

JUDGMENT

Before: CHAMBERS and KOELSCH, Circuit Judges, and JAMESON, * District Judge.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated August 24, 1973, against Respondents, Associated Shower Door Co., Inc.; and Century Shower Door Company, Inc., their officers, agents, successors, and assigns. The Court heard argument of respective counsel on January 8, 1975, and has

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* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

considered the briefs and transcript of record filed in this cause. On February 24, 1975, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondents, Associated Shower Door Co., Inc.; and Century Shower Door Company, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain in good faith with Glaziers & Glassworkers Union Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO, (hereinafter called the Union), as the exclusive collective bargaining representative of their employees in the classifications covered by the Association-Union contract and refusing to comply with all the terms and conditions of that contract.

2. Take the following affirmative action which will effectuate the purposes of the National Labor Relations Act:

(a) Recognize the Union as the exclusive collective bargaining representative of the Respondents' employees in classifications covered by the Association-Union contract, bargain with the Union at its request, and make the Union and their employees in the classifications covered by the contract whole for any losses they may have suffered by virtue of the Respondents'

refusals to comply with that contract since its inception;

(b) Comply with all the terms and conditions of the Association-Union contract, both for the balance of its term and retroactively;

(c) Preserve and, upon request, mak make available to the National Labor Relations Board or its agents, for examination and copying, all records necessary for the determination of the amount of backpay and other payments and obligations due under this Judgment;

(d) Post at all places of business in the Los Angeles, California area copies of the attached notices marked "Appendixes A, & B." Copies of such notice shall be furnished to the Respondents by the Regional Director for Region 31 of the National Labor Relations Board, (Los Angeles, California), and shall be signed by authorized representatives of the Respondents and posted immediately upon receipt thereof and maintained for at lease 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other material.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps Respondents have taken to comply herewith.

With Costs in favor of the N. L. R. B. and against the respondent:

Cost of printing brief of NLRB	$171.00
Cost of printing reply brief of NLRB	129.60
Cost of reproducing the record	275.55
TOTAL	$576.45

Endorsed, Judgment Filed and Entered

/s/ Emil E. Melfi
Emil E. Melfi

SO ORDERED:
/s/ Richard H. Chambers
/s/ . Koelsch
U.S. CIRCUIT JUDGES

A TRUE COPY,

/s/ William J. Jameson
U.S. DISTRICT JUDGE

ATTEST: May 2, 1975
Emil E. Melfi
Clerk

by: /s/ Su White
SUSAN A. WHITE, Deputy

FILED
MAY 2, 1975
Emil E. Melfi, Jr., Clerk
U.S. Court of Appeal

NOTICE TO
EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFOR ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE
UNITED STATES GOVERNMENT

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice:

WE WILL NOT refuse to bargain in good faith with GLAZIERS AND GLASSWORKERS UNION LOCAL 636, INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, as the exclusive collective bargaining agent of our employees classified as production, maintenance and installation employees.

WE WILL NOT refuse to comply with all the terms and conditions of the contract negotiated on our behalf by the ASSOCIATION OF SHOWER DOOR INDUSTRIES, INC., with GLAZIERS LOCAL 636 for the term of that contract.

WE WILL make GLAZIERS LOCAL 636 and our production, maintenance and installation employees whole for any losses in wages or other benefits they may have suffered by virtue of our failure to comply with the contract set out

above since its effective date in November of 1971.

ASSOCIATED SHOWER DOOR
COMPANY, INC.
(Company)

Dated:_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Blvd., Los Angeles, California, 90024, Telephone, Area Code 213, 824-7357.

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WE WILL make GLAZIERS LOCAL 636 and our production, maintenance and installation employees whole for any losses in wages or other benefits they may have suffered by virtue of our failure to comply with the contract set out

above since its effective date in November of 1971.

CENTURY SHOWER DOOR
COMPANY, INC.
(Company)

Dated: _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Blvd., Los Angeles, California, 90024, Telephone, Area Code 213, 824-7357.

DOCKET s/s JR
April 29, 1975

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	FILED APRIL 25, 1975
Petitioner,	)	Emil E. Melei, Jr.
vs.	)	Clerk
	)	U.S. Court of Appeals
ASSOCIATED SHOWER DOOR CO., INC.; CENTURY SHOWER DOOR COMPANY, INC.; and LOS ANGELES SHOWER DOOR COMPANY,	)	No. 74-1033
Respondents.	)	

Before: CHAMBERS and KOELSCH,
Circuit Judges,
and JAMESON, * District Judge.

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

The panel, as constituted in the above case, voted to deny the petition for a panel rehearing. Judges Chambers and Koelsch voted against a rehearing in banc, and Judge Jameson recommends against a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. F. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.), are Sections 8(c)(1) and 8(a)(s), which provide as follows:

> 8. Unfair Labor Practices.
> (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * * * * * * * * * * * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

29 U.S.C. §158 (a)(1) and (5).

Also relevant herein is the Economic Stabilization Act of 1970 which became law August 15, 1970, and was subsequently amended

many times. 1/ During the period relevant to the instant case--August through November, 1971 --it read as follows. 2/

1/ The Stabilization Act was amended on Dec Dec. 17, 1970 extending its expiration date (Pub. L. No. 91-558, Title II, §201 84 Stat. 1468). It was amended on March 31, 1971 again extending the date of expiration (Pub. L. No. 92-8, §2, 85 Stat. 13). The Stabilization Act was then amended on May 18, 1971 extending the expiration date still further and adding subsection (b) to §202 regarding Presidential authority (Pub. L. No. 92-15, §3, 85 Stat. 38). This was the final amendment enacted prior to the occurrences in the instant case. The Stabilization Act was altered more extensively in two later amendments (Act of Dec. 22, 1971, Pub. L. No. 92-210, §2, 85 Stat. 743, entitled "Economic Stabilization Act Amendments of 1971" and Act of April 30, 1973 Pub. L. No. 93-28, §§2-8, 87 Stat. 27-29, entitled "Economic Stabilization Act Amendments of 1973"). These two later sets of amendments however, are not relevant to the instant case as they were adopted after the facts of the case at bench took place.

2/ This text is comprised of the original Economic Stabilization Act enactment of August 15, 1970 (Title II, 84 Stat. 799) and the amendments of May 18, 1971 (§3, 85 Stat. 38). The intervening amendments of Dec. 17, 1970 and March 31, 1970 were superceded by the amendments of May 18, 1971.

"§201. Short Title

This title may be cited as the "Economic Stabilization Act of 1970"

"§202. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities.

"(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally."

"§203. Delegation

The President may delegate the performance of any function under this title to such officers, departments,

and agencies of the United States as he may deem appropriate.

"§204. Penalty

Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000.

"§205. Injunctions

Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section to enforce orders and regulations issued under this title, that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title.

"§206. Expiration

> The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1972 but such expiration shall not effect any proceeding under section 204 for a violation of any such order or regulation, or for the punishment for contempt committed in the violation of any injunction issued under Section 205, committed prior to May 1, 1972.

Because "the stabilization of wages and prices in the construction industry [was] essential to the maintenance of a strong national economy economy...," 5/ a Construction Industry Stabilization Committee was established by Executive Order 6/ to monitor proposed wage increases including the increases contained in the collective bargaining agreement in the instant case. The sections of the Executive Order important for the case at bench follow:

* * * * * * * * * * * * * * * * * * *

> "Sec. 3(a). It shall be the responsibility of each board, in relation to the craft or branch over which it has jurisdiction, to provide advice and assistance in an effort to resolve any unresolved collective bargaining disputes involving wages and salaries and to promptly examine every collective bargaining agreement negotiated on or after the date of this order and to determine, in accordance with the criteria established in section 6, 7/ whether wage and salary increases in the agreement are acceptable and may thus be approved. The board shall make determinations within a reasonable time and shall notify the parties and the Committee of action taken. When it is determined by the board that a wage or salary increase is not acceptable, the board shall also notify the Secretary of Labor.

5/ Executive Order No. 11588, 3 C.F.R. 147 (Supp. 1971).

6/ Id.

7/ "Sec. 6. The following criteria shall be applied in determing whether any wage or salary increase is acceptable:

"(a) Acceptable economic adjustments in labor contracts negotiated on or after the date of this order will be those normally considered supportable by productivity improvement and cost of living trends, but not in excess of the average of the median increases in wages and benefits over the life of the contract negotiated in major construction settlements in the period 1961 to 1968.

"(b) Equity adjustments in labor contracts negotiated on or after the date of this order may, where carefully identified, be considered over the life of the contract to restore traditional relation-

(continued)

* * * * * * * * * * * * * * * * *

"Sec. 4(c). Unless and until an increase in wage or salary has been approved in accordance with the provisions of sections 3(a) 8/ and 4 9/ of this order, it shall be a violation of this order to put such wage or salary increase into effect.

* * * * * * * * * * * * * * * * *

7/ (Continued from page E-6) ships among crafts in a single locality and within the same craft in surrounding localities.

8/ See Supra.

9/ The remaining sections of 4, (a) and (b) state:

"Sec. 4(a). Upon receipt of notification by a board that it has found a wage or salary increase acceptable, the Committee shall have fifteen days in which to determine whether it will assume jurisdiction over the matter. If the Committee does not determine within that time, and so notify the parties and the board, that it will assume jurisdiction, the board's determination will be deemed final and the increase may take effect. If the Committee determines that it will assume jurisdiction it shall be a violation of this order to implement the increase unless and until the Committee affirms the board's initial determination. The Committee shall notify the parties, the board and the Secretary of Labor of its final action.

(Continued)

The final portion of federal law relevant to the instant case is the order of the wage and price control Pay Board elucidating which collective bargaining agreements fall under the authority of the CISC.

PAY BOARD
(Order No. 2)
CONSTRUCTION INDUSTRY
STABILIZATION COMMITTEE

Authorization Regarding Wages, Salaries, and Other Economic Adjustments
November 13, 1971

1. The Pay Board authorizes the Construction Industry Stabilization Committee, effective 14, 1971, to administer the policies of the Pay Board with respect to wages and salaries and other economic adjustments in the building and construction industry. In other respects, Executive Order No. 11583 of March 29, 1971 remains in effect.

2. All wages and salaries and other economic adjustments contained in collective bargaining agreements, whether scheduled to take effect in the period from August 16 through

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9/ (Continued from page E-7)

(b) The Committee is also authorized, upon its own motion, if a board has not yet reported or an appropriate board has not been established to review any proposed wage or salary increase to determine its acceptability."

November 13, 1971, or scheduled to take effect after November 13, 1971 whether or not previously approved by the Committee), now require the approval of the Construction Industry Stabilization Committee regardless of the number of employees affected.

3. The Pay Board shall prescribe the form of procedures to be followed by the Construction Industry Stabilization Committee to assure conformity with the announced policies of the Pay Board.

4. This order shall be effective at 12:01 a.m. November 14, 1971.

By direction of the Board.

George H. Boldt,
Chairman of the Pay Board.

[FR Doc. 71-16802 Filed 11-15-71; 11:31 a.m.]

36 Fed Reg. 21857 (Nov. 1971)